In the Supreme Court of the United States

OCTOBER TERM, 1967

No.

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ROYALTON STONE CORPORATION, FRONTIER STONE PRODUCTS, INC., HOLMAN O'CONNOR AND MARY W. O'CONNOR, JAMES M. SWITZER AND DOROTHEA W. SWITZER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, but only if this Court grants respondents' petition for certiorari, filed on September 12, 1967, No. 604, this Term, which seeks review of the same judgment.

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 18–54)[1] is not officially reported. The opinion of the court of appeals (Pet. 7–12) is reported at 379 F. 2d 298.

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[1] "R" refers to the appendix to respondents' brief in the court of appeals. "Pet." refers to the petition for certiorari in No. 604, this Term.

279-721—67——1

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1967. On September 14, 1967, Mr. Justice Harlan extended the time for filing this protective petition to and including October 26, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the amounts that the corporate respondents paid the individual respondents for minerals removed from the latter's land were depletable ordinary income of the individuals and therefore properly allowed as a business expense deduction of the corporations.

STATEMENT

The individual respondents entered into purported sales agreements with the corporate respondents, their wholly-owned corporations. The corporations were to quarry and remove sand, gravel, stone and associated materials from the individuals' land and pay 20 cents per ton removed. Respondents treated the transaction as giving rise to capital gains to the individuals and as not giving the corporations the right to claim the payments as business deductions. The Commissioner determined deficiencies in the individuals' tax liability on the ground that the proceeds were depletable ordinary income. In a suit for redetermination, the Tax Court sustained the Commissioner's position as to the individuals and allowed the corporations to deduct the tonnage payments in full as business expense. The court of appeals affirmed. Respondents here seek review of that judgment in No. 604, this Term.

REASON FOR GRANTING THE WRIT

The purpose of this petition for certiorari is to preserve the Commissioner's interest in securing consistent treatment of the tax consequences of this transaction to the individuals and the corporations. If the courts below correctly held, as we believe, that the tonnage payments were depletable ordinary income to the individuals, then the corporations were properly allowed deductions for the payments. If, however, this Court should grant the petition in No. 604, this Term, and hold that the individuals were entitled to capital gains treatment, the Court should at the same time hold that the corporations were not entitled to business deductions.

Therefore, if this Court should allow the individual respondents' petition in No. 604, this Term, it should also allow the instant petition in order to protect the public revenues with respect to the tax liability of the corporations.

CONCLUSION

If certiorari be granted in No. 604, this Term, this petition should also be granted; but if certiorari be denied in No. 604, this petition should be denied.

Respectfully submitted.

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